

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

DAVID C. JAMES
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: April 21, 1997
TO: Ross McCollum, Community Services
FROM: David C. James, Deputy City Attorney
SUBJECT: Booker T. Crenshaw Christian College/Crenshaw Community Development School - Community Development Block Grant

QUESTION PRESENTED

Whether the Booker T. Crenshaw Christian College and School Ministries ("The Ministry") may receive a Community Development Block Grant ("CDBG") for the development of the Crenshaw Community Development School ("The School").

SHORT ANSWER

No. An award of a public grant to The Ministry would violate both the federal and state constitutions.

ANALYSIS

I. UNITED STATES CONSTITUTION

The First Amendment to the United States Constitution states in part, "Congress shall make no law respecting an establishment of religion." The provisions of the First Amendment are binding on the states through the due process clause of the Fourteenth Amendment. Wallace v. Jaffree, 472 U.S. 38, 50 (1985).

In assessing whether a statute providing public funds to religious institutions impermissibly crosses the church/state wall of separation, the Supreme Court has generally applied the three-part test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). To withstand an Establishment

Clause challenge, the statute must (1) have a clearly secular legislative purpose; (2) neither advance nor inhibit religion as its principal or primary effect; and (3) not foster excessive government entanglement with religion. Id.; see also California Educational Facilities Authority v. Priest, 12 Cal. 3d 593, 600 (1974).

A. Secular Purpose

If an institution is deemed to be “pervasively sectarian,” then it will almost always be determined that the primary effect of the aid will be to advance religion. But when the benefitting institution is found not to be ‘pervasively sectarian,’ when considering the “primary effect” of the government aid, it is presumed that the aid will be used in compliance with the Constitution.

Walker v. San Francisco Unified School, 741 F.Supp. 1386, 1392 (N.D. Cal. 1990).

The Supreme Court has relied on a profile to identify pervasively sectarian institutions.

According to this profile, such an institution is one that (1) imposes religious restrictions on admissions, (2) requires attendance of pupils at religious activities, (3) requires obedience by students to the doctrines of a particular faith, (4) requires pupils to attend instruction in the theology of a particular faith, (5) is an integral part of the religious mission of a sponsoring church, (6) has as an integral substantial purpose the inculcation of religious values (7) imposes religious restrictions on faculty appointment, and (8) imposes religious restrictions on what or how the faculty may teach.

Id., citing Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 767-68 (1973).

In its application/Letter of Interest for CDBG funds, The Ministry states the monies will be used to acquire and rehabilitate certain properties for the development of The School, and for site preparation and rental costs for portable classrooms. The School will include a science and technology center, computer lab, and classroom space which will primarily be used by low-income, minorities who attend The School. Although The Ministry also plans to make The School facilities available to the community at large, it does not indicate whether The School will be used *exclusively* for secular purposes or whether it plans to include sectarian classes and/or impose religious restrictions on student admissions and faculty appointments.

The School has not filed Articles of Incorporation with the Secretary of State. Thus, The School is not recognized as a separate legal entity, but is solely subject to the Articles of

Incorporation that govern The Ministry, a religious organization. In order for The School to establish itself as a separate and independent nonsectarian institution, it is incumbent upon The School to file its own Articles of Incorporation. The Ministry's plan to establish an independent Board of Directors for The School will not satisfy this requirement.

If The Ministry can ensure that The School will not be a "pervasively sectarian" institution, the first part of the Lemon test, requiring a showing of secular purpose, will be met. The fact that The Ministry plans to house the offices of The School in the same building in which it operates its religious school is immaterial. Neither does The School's affiliation with The Ministry have any legal bearing on its qualifications for CDBG funding. "The Supreme Court has observed that 'it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired"' in order to find a First Amendment violation. Kendrick, 108 S.Ct. at 2580." Walker, 741 F.Supp. at 1393. In Walker, the court held that the use of public funds at a nonsectarian school located on the premises of a charitable and religiously affiliated organization was not enough to make government funding unconstitutional. Id.

B. Primary Effect Must Not Advance or Inhibit Religion

The second prong of the Lemon test requires that statutes providing public funds to religious institutions (such as The Ministry) must not have the primary effect of either advancing or inhibiting religion. Lemon, 403 U.S. at 612. While it has been held that religious institutions are not prohibited from receiving "an indirect, remote, and incidental benefit from a statute which has a secular primary purpose," the crucial question is "whether that benefit is incidental to a primary public purpose." Priest, 12 Cal. 3d at 605.

As it stands, The School would be governed by The Ministry's Articles of Incorporation, so it appears it would be "pervasively sectarian." The Ministry's Articles of Incorporation state that it is organized "exclusively for religious purposes." Upon dissolution, The School and all of its assets and property, including any property subsidized with CDBG funds, would revert to The Ministry for religious use. This would be a direct, rather than incidental, benefit to The Ministry, in violation of the Constitution.

C. Excessive Entanglement

The third prong of the Lemon test prohibits state funding where it creates excessive government entanglement with religion. “As with the second prong or ‘primary effect’ aspect of the Lemon test, the third prong or ‘excessive entanglement’ aspect requires the Court to give primary consideration to the question of whether the benefitting institution is pervasively sectarian.” Walker, 741 F.Supp. at 1394.

In Walker, because the school was nonsectarian and the school district maintained control over all essential aspects of the curriculum and policy, the court determined there was no government entanglement with a religious institution. The Walker court observed that the Supreme Court “has also noted that when an institution is pervasively sectarian, it is impossible for the state to identify and subsidize separate secular functions without monitoring the use of that aid. The Court has also noted that when an institution is not pervasively sectarian, the need for the state to monitor the aid is ‘substantially reduced’.” Id. In Tilton v. Richardson, 403 U.S. 672, 673 (1971), the court found that “aid, which was provided on a one-time, single-purpose basis” to church-related colleges and universities by way of construction grants for buildings and facilities to be used exclusively for secular educational purposes did not foster excessive government entanglement with religion.

We cannot be sure that the proposed use of The School would *not* be “pervasively sectarian.” However, if The School is primarily used for secular purposes, it is unlikely that a “one-time, single-purpose” use of CDBG funds for its development will foster excessive government entanglement with religion.

II. CALIFORNIA CONSTITUTION

The Ministry’s proposed use of public funds for The School must also be in compliance with the state Constitution. Article XVI, section 5 of the California Constitution reads:

Neither the legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church or sectarian denomination whatever.

Article IX, section 8, provides, “No money shall ever be appropriated for the support of any sectarian and/or denominational school, or any school not under the exclusive control of the officers of the public schools. . . .”

The question of whether the grant of public funds to The Ministry violates the California Constitution turns on the characterization of The School as either a sectarian or nonsectarian institution. If the proposed use of The School is found *not* to be “pervasively sectarian,” then it is unlikely that the California Constitution would be infringed. In Walker, the court noted that since the school at issue was not sectarian and was under the direct control of the public school system, the provisions of the California Constitution were not applicable. Walker, 741 F.Supp. at 1395.

CONCLUSION

A CDBG award to The Ministry for the The School project could directly benefit The Ministry and further its religious objectives in the future. Inasmuch as The School has no Articles of Incorporation establishing it as an independent secular entity, it is subject to the same Articles that empower The Ministry. Therefore, it must be viewed as a component of The Ministry and not as a nonsectarian institution. Because The Ministry’s proposal to develop The School does not comply with the constitutional requirements discussed above, The Ministry does not qualify for CDBG funds.

CASEY GWINN, City Attorney

By

David C. James
Deputy City Attorney

DCJ:VW:vw:smf:666(x043.2)
ML-97-21